UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 27 | Number 2 Article 1

2-1-1949

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J. Francis Paschal

THE ROTATION OF SUPERIOR COURT JUDGES*

J. FRANCIS PASCHAL**

Addressing the North Carolina Bar Association in 1914 on the subject of "Reform in Law and Legal Procedure," Chief Justice Walter Clark declared:

> It seems to me that in North Carolina the first and most essential reform is to lay the axe at the root of our troubles. Our system of rotating the judges is utterly indefensible. It is antiquated, expensive to the public and to the judges, and illogical in every respect. It is the chief cause of the delays and evils in our State judicial system.[1]

This statement is a strong one. Yet the opinion it reflects has been expressed repeatedly over a period of more than forty years. On the other hand, the advocates of the rotation system have been equally positive and equally tenacious in their conviction that the system is a desirable one. They have said that the rotation system is "too large a part of the life of our people to be abandoned."[2] In this circumstance, it has seemed to me that it would be worth while to review in some detail the controversy inspired by these two opposing points of view.

I

Before presenting the arguments adduced, however, it might be well to inquire into the historical background of the provision of our Constitution which requires rotation.[3] This particular section did not become a part of our fundamental law until 1876. There were, however, several statutory forerunners, the first of which was passed in 1790.[4]

* The N. C. LAW REVIEW was privileged to carry in an earlier issue (see 26 N. C. L. REV. 335 (1948)) an article bearing this same title by the Hon. William H. Bobbitt, Judge of the Superior Court. This article aroused such interest that the Editors believe that readers of the LAW REVIEW will welcome further discussion, particularly from the historical viewpoint.

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[1] 16 REP. N. C. BAR ASSN. 49 (1914).

[2] 30 REP. N. C. BAR ASSN. 148 (1928). The words are taken from a report signed by R. O. Everett, S. M. Gattis, and A. A. Hicks.

[3] "Every Judge of the Superior Court shall reside in the district for which he is elected. The Judges shall preside in the courts of the different districts successively, but no Judge shall hold the Courts in the same district oftener than once in four years; . . ." N. C. Constitution, Art. IV, Sec. 11.

[4] Iredell, *Laws of North Carolina* (1791), p. 696. This is chapter three of the *Laws* of 1790. The complete statutory and judicial history of rotation is con-

This statute, after grouping the Superior Courts of the State into two ridings, went on to command that

> the Judges of said courts shall so arrange their attendance at said courts, that two of them shall regularly attend the courts of the Western riding, and the other two, those of the Eastern riding, and in such manner that any two of the said Judges shall not attend the same courts successively, but one of the said Judges shall pass into the other riding at each succeeding circuit, and this change shall be performed by them in regular rotation.

In view of the purposes which have been attributed to the framers of this Act, it is of interest to consider just what it was designed to accomplish. In this regard, the most important single clue is furnished by the fact that in 1790 there were eight Superior Court districts but only three judges to hold them.[5] No one judge was solely responsible for the holding of any court. Rather the responsibility for holding all eight was collective, shared alike by the three judges. Thus, the problem of which judges should attend a particular court was one left to the judges themselves to solve.

This arrangement, however, proved to be unsatisfactory. Apparently, none of the judges had any desire to make the long and arduous journey from his home to the "Morgan Court."[6] Since no one of them was himself responsible for so doing, the result was that often times the Morganton court was not held at all. In 1788, for example, the General Assembly took official notice of "the non-attendance of some of the judges at the superior court of Morgan" and the resulting "great grievance to the inhabitants of said district."[7] The legislators also declared that "from the great distance and local circumstances of said judges, it appears impracticable to get them to attend said court."[8] The situation was more fully described in a report submitted to the General Assembly the preceding year. The report charged

> That the Judges, Ashe and Williams, have never attended the Superior Court of Morgan District, by reason of which matters of Law in that Court remain undecided;[9] and that all the Judges occasionally neglect to attend their Courts regularly. . . .

tained in a paper by Mr. Francis E. Winslow which appears at 37 REP. N. C. BAR ASSN. 146 (1935). Mr. John A. Livingstone has also written on the subject. See 6 N. C. L. REV. 110 (1927). There is in addition, of course, the sagacious article of Judge Bobbitt's mentioned in the note above. I regret to state, however, that it did not come to my attention until my own effort was in substantially its present form.

[5] Battle, HISTORY OF THE SUPREME COURT, 103 N. C. 341 (1889).

[6] The three judges were Samuel Ashe of New Hanover, Samuel Spencer of Anson, and John Williams of Granville.

[7] THE STATE RECORDS OF NORTH CAROLINA, Vol. XXIV, p. 975.

[8] *Ibid.*

[9] This complaint is better understood when it is remembered that "matters of Law" could not be decided except by a court consisting of at least two judges.

> That the Number of Cases in the Superior Courts, are from the above Causes and perhaps from others, so much increased, that many Suitors have lost all hopes of ever seeing them determined. . . . All the Circumstances with respect to the Neglect and delay of the Judges being a Matter of public Notoriety, your Committee have not thought it necessary to produce any proof thereof.[10]

Viewed against this background, it seems clear that the Act of 1790 was designed generally to speed the administration of justice and, so far as rotation was concerned, to arrange a schedule for the judges so that it should no longer be a matter of argument as to who would hold a particular court. A scrutiny of the Act itself confirms this analysis. Its preamble recited that

> it hath become necessary to a due and regular administration of justice, that the terms of the superior courts of law and equity should be enlarged, and that the business of the said courts should be so arranged and expedited as to be less expensive to the suitor, and more convenient to jurors and witnesses.[11]

The entire Act was aimed at expediting business in the courts. Under heavy penalty, clerks were required to advertise in advance what business would be transacted at a particular term and by what judges.[12] Pleadings were not to be "abated, arrested, quashed, or reversed for any defect or want of form."[13] Judges were penalized seven pounds for each day of absence.[14] The appointment of a Solicitor General to aid the Attorney General was also provided for.[15]

With all this, however, the central problem remained to be solved. How was the onerous duty of attending the "Morgan Court" to be apportioned? The obvious answer was that all the judges should share it equally. Accordingly, a fourth judge was added,[16] thus making it possible to divide the State into two ridings with each riding manned by two judges. One judge from each riding was to pass into the other riding every six months. Since this change was to be in "regular rotation," it not only evenly distributed the judicial labors. It did more. It definitely established the identity of the judges responsible for holding any court.

The principle of rotation, thus adopted in 1790, was retained by the General Assembly until 1868 when it was expressly repudiated by the Constitution adopted in that year.[17] A plausible reason for its retention

[10] THE STATE RECORDS OF NORTH CAROLINA, Vol. XVIII, p. 424. The omitted paragraph speaks of the "tedious disputes" among the judges.
[11] Iredell, *Laws of North Carolina* (1791), p. 696.
[12] *Id.*, §III. [13] *Id.*, §IX. [14] *Id.*, §VI. [15] *Id.*, §VII. [16] *Id.*, §II.
[17] "The State shall be divided into twelve judicial districts, for each of which a Judge shall be chosen who shall hold a Superior Court in each county in said District, at least twice in each year. . . ." N. C. CONST., Art. IV, §12 (1868).

was furnished by the system of judicial selection which then prevailed. With judges selected from the State as a whole and by one central appointing authority (the Legislature), it no doubt seemed fair and reasonable that they should serve all the people. The people thus shared together the benefits brought by a good judge and suffered alike the inconvenience of one less capable.

As indicated, rotation was abandoned in 1868. The Constitutional Convention of 1875, however, proposed its return by a specific constitutional mandate and this proposal was accepted by the people at the ensuing election. This Convention, therefore, was the author of the system which exists today. As such, it deserves some attention. It was the result of a supreme effort by the Democratic party to undo, in so far as was possible, the results of Reconstruction and to reclaim the State from the carpetbaggers and scalawags. At no other time in the State's history have political issues generated such violent passions. The election in which the delegates were chosen was as bitter and hard fought as could be imagined. The result was almost a dead heat, each side receiving a few more than 95,000 votes.[18] When the smoke had cleared away, it was discovered that the Democrats had elected 59 delegates, the Republicans 58. The balance of power therefore was in the hands of three Independents. Their influence was increased when the sudden death of William A. Graham reduced the Democratic strength to 58.

The Convention itself was a stormy affair. Fourteen ballots were required to elect a presiding officer. By supporting for the presidency one of the Independents, the Democrats finally won control. Almost from the outset, the Republicans sought to adjourn the Convention *sine die*. With such a threat hanging over them, no Democratic delegate dared leave the floor.[19]

Long before the Convention met, the Democratic leaders had proclaimed their intention to rewrite the judiciary article of the Constitution.[20] Indeed, judged by what they actually did, this was their chief objective. Reconstruction with all its works was abhorrent to them,

"Every Judge of a Superior Court shall reside in his District while holding his office. The Judges may exchange districts with each other with the consent of the Governor. . . ." *Ibid.*, §14.

[18] This was the occasion of the famous telegram, "As you love your State, hold Robeson," sent by the Chairman of the State Democratic Committee to his cohorts in that county.

[19] The facts on the Convention presented here, and in the following paragraphs, were taken, except where otherwise noted, from Hamilton, RECONSTRUCTION IN NORTH CAROLINA (1914), pp. 631-643, and the CONVENTION JOURNAL.

[20] Democratic State Committee, *"Address to the People,"* July 1, 1874. This pamphlet is in the University of North Carolina Library. Curiously, it made no mention of rotation. An earlier pamphlet issued in 1870 had asked for an amendment which "authorizes the Legislature to provide for a proper system of rotation among the judges."

but the carpetbag administration of justice was especially hateful. They denounced the code as a foreign product, "in no sense adapted to the wants, habits, tastes, convenience or economy of our people."[21] In the end, however, they decided to accept the new procedure and concentrate their attention on securing an improved personnel for the judiciary of the State.

Some of the Reconstruction judges apparently were men of the most unsavory character, particularly the notorious "Greasy Sam" Watts. For the first time in the State's history, some judges had appeared as open and avowed partisans. This was attributed to their failure to rotate as they had formerly done. But others saw that the problem was not so simple. A judge of the Watts type was certain to be offensive wherever he held court. The problem was to be rid of him and his like entirely.

To meet this situation, the Convention took several measures, of which rotation was only one. In the first place, it reduced the number of judges from twelve to nine.[22] Then it reestablished, at least for the next election of judges, the practice of electing them by the State as a whole.[23] By this arrangement, since the Democrats hoped to be able to carry the whole State, the danger that the "Black Counties" of the East would be served by judges selected by Negroes and their allies was considerably lessened. The problem still remained, however, of dealing with the partisan judges whose term of office still had some years to run, or such judges who might be elected in the future. According to testimony given afterwards, it was this circumstance that brought rotation back.[24] No one district was to be forced to bear the burden of such a judge for his entire term but it was to be apportioned out among all the people. This was entirely rational under the conditions then prevailing. Political feelings were so bitter and emotions so violent that it was thought to be impossible that the judiciary could altogether be removed from politics so long as they continued to be elected by the people.[25]

The rotation amendment, together with others approved by the Convention, was submitted to the people the next year. The amendments were voted on together and not individually. They were accepted by

[21] *Id.* at 2.

[22] N. C. CONST., Art. IV, §10.

[23] ". . . The judges of the Superior Courts, elected at the first election under this amendment, shall be elected in like manner as is provided for justices of the Supreme Court, . . ." N. C. CONST., Art. IV, §21. This repealed c. 6 of the Laws of 1871-2 which provided for election by districts.

[24] This remark was made several times. See, *e.g.*, the comment of Judge G. V. Cowper at 29 REP. N. C. BAR ASSN. 106 (1927).

[25] William A. Graham expressed this view in a long letter (undated) which appears in the Quentin Busbee SCRAPBOOK, now in the University of North Carolina Library.

a majority of roughly 13,000. The amendment has sometimes been pictured as a return to an ancient tradition of the State. In some respects it was, but it seems pertinent to say that there were several important differences. They were:

1. Whereas rotation had previously been the law merely by force of statute, it now assumed the rigidity of a constitutional command.

2. Whereas originally, some rotation was practically a mathematical necessity there being more districts than there were judges, districts and judges were and had been equal in number for some time.

3. Instead of merely requiring that a judge should not hold the same series of courts successively, the new requirement was that he must not hold them "oftener than once in four years."

4. Whereas formerly judges had been appointed, in theory and in fact, by a central agency, they came to be selected on a local basis, thus destroying one of the justifications for the system.

The history of the rotation question over the next twenty-five years is confined primarily to a series of judicial constructions of the constitutional requirement.[26] These are notable in that they represent the first retreat from the notion that a judge must be barred absolutely from holding "courts in the same district oftener than once in four years." As interpreted by the Court, this provision was said to require only that the "regular ridings of a whole district or circuit by any given judge would not occur oftener than once in four years."[27] The result has been, as Mr. Winslow says, that "pure rotation has been abandoned and we have it only in modified form."[28]

II

The controversy over the rotation question really began with the forming of the North Carolina Bar Association in 1899. The Association wasted no time in grappling with the subject. At the second meeting, a resolution was presented recommending that "the State be divided into two rotating circuits."[29] Immediately a spirited argument took place. The opponents of the resolution relied principally on the argument that it was unconstitutional.[30] Its advocates, on the other hand, while never expressly asserting that rotation should be abandoned,

[26] The two leading cases are *State v. Monroe*, 80 N. C. 373 (1879), and *State v. Turner*, 119 N. C. 841, —— S. E. —— (1896).

[27] *State v. Turner*, 119 N. C. 841, 845, —— S. E. —— (1896).

[28] 37 REP. N. C. BAR ASSN. 160 (1935).

[29] 2 REP. N. C. BAR ASSN. 26 (1900).

[30] The point is, of course, that the Constitution requires the judges to preside in the courts "of the different districts" successively, presumably referring to all the districts. Under this view, the Act of 1915 dividing the State into two divisions is unconstitutional. However, there is no way to challenge it as any judge will have at least *de facto* authority.

painted a dark picture of the conditions prevailing. Mr. A. S. Barnard of Asheville exclaimed:

> I have been at the Bar for five years. When I came here there were five or six hundred cases on this docket. There are on the docket five or six hundred cases still. This docket has never been cleared. It has gotten so that litigants refuse to go into court, and give up and compromise valuable cases, for the reason that they are unable to get trials within three or four years.[31]

Mr. Thomas A. Jones, also of the Asheville Bar, blamed the judges for the present troubles. "The judges come here," he said, "and hold court for about three hours a day and spend the rest of the time up at the Battery Park."[32] After further discussion, the resolution as to rotation was abandoned and one calling for more Superior Court districts adopted.[33]

The next year the question was presented in sharper focus. Mr. V. S. Bryant of Durham offered a resolution recommending the following amendment to the Constitution:

> The General Assembly may divide the State into divisions containing not less than six districts each, and the judges shall ride successively the different districts only of the division to which they belong and shall hold the courts of the same district not oftener than once in three years, but the Governor may require any judge to hold one or more terms in any district in the State or may authorize the exchange between two judges of the whole, or part, of a riding whether the judges so exchanging belong to the same or different divisions.[34]

The opponents of this resolution saw in this a direct attack on the rotation system. Mr. Charles F. Warren of Washington gave voice to their fears as follows:

> This proposed amendment, with sixteen Judicial districts as now, would divide the State into two rotating circuits. With a further increase of the number of districts, as the business and population of the State might demand, the division under this proposed amendment would be into three or more rotating circuits. Besides this amendment would permit the exchange of an entire district, as well as part of it, between Judges of the same or different rotating circuits. If we should begin to sap and undermine the principle of rotation by a division into rotating districts, and should permit the exchange of entire districts, it would not be long, I fear before the whole system would fall.[35]

Mr. Warren, together with Mr. E. B. Jones of Winston-Salem,

[31] 2 REP. N. C. BAR ASSN. 38.
[32] *Id.* at 46.
[33] *Id.* at 48.
[34] 3 REP. N. C. BAR ASSN. 22 (1901).
[35] *Id.* at 44. Apparently, no vote was taken on Mr. Bryant's resolution.

stoutly defended the rotation system. They foresaw a danger of bitter sectional feeling if the proposed amendment was adopted, and they both feared for the independence of the judiciary if the principle was touched in any way.

In defending his proposal, Mr. Bryant disclaimed any opposition to the principle of rotation. He did assert, however, that there were evils in the system, a fact which, he said, "no member of this Association can deny." The principal thing bothering him was the frequent unavailability of a judge when he was needed. Mr. Bryant assured his hearers that while we should not lightly give up the past,

> neither should we cling to it when it is evident that a change will promote the welfare of the State. We all should believe a great deal in sentiment, but none of us should believe in sentiment to the point of disturbing the public good.[36]

The question of dividing the State into two divisions was again before the Association the next year. A committee consisting of E. F. Aydlett, Charles W. Tillet, R. R. King, and E. J. Justice announced that their opinion was that a constitutional amendment would be necessary, and that although desirable, the time was not ripe for presenting it.[37] Mr. Warren displayed some annoyance that the question should have been presented a third time. He said that he did "not know of any demand on the practicing attorneys of North Carolina for any change in the rotating system." Accordingly, he moved that consideration of an amendment be "indefinitely postponed." His motion prevailed on a voice vote.[38]

There the matter rested, so far as the Bar Association reports show, until 1911. In that year the question was again reopened, this time by Mr. Charles W. Tillet in his presidential address. Mr. Tillet opened his argument with an excerpt from a letter from an unidentified judge who had written:

> Rotation is a serious hindrance. The reason for it has ceased. It incurs heavy expense, serious inconvenience, discomforts and privations. It is a menace often to health. It requires well-nigh perpetual violations of the Sabbath day. The valuable information a judge gets on a circuit in six months to enable him to dispatch public business in working harmoniously with men with whom he has become acquainted, is absolutely put aside and lost in the transfer into a new field the next six months. It prevents the judges from having periodical days, when at convenient time and place attorneys may have motions and work at chambers heard and cases on appeal settled. If a judge re-

[36] *Id.* at 45.
[37] 4 REP. N. C. BAR ASSN. 44 (1902).
[38] *Id.* at 17.

> mained on his own heath, he would have an added stimulus to clear all dockets. No change in our system will tend more to dispatch the business of the courts. Besides, every district would have a powerful incentive to put its ablest and best lawyer on the bench.[39]

Mr. Tillet then went on to remark:

> . . . It is an open secret—I say "open" because two judges, at least, have mentioned it to me—that there is a widespread complaint that judges are glad to hear motions for continuance and to grant them on the most trivial grounds, and particularly so if the case in which the motion is made is a long one and a continuance of it will break up the court and permit the judge to go home. Would a jury of lawyers find a true bill in this indictment? I am inclined to think they would; and *such would still be the case if each lawyer here present was called upon in turn to serve as Superior Court Judge.*

In this same year a resolution was presented by a committee composed of Francis D. Winston, J. D. Murphy, A. B. Andrews and A. L. Brooks. It condemned the "present system" as "burdensome and unnecessary," and proposed an increase in the number of judicial districts and the creation of three separate divisions.[40] Once more the old arguments appeared. The horrors of the Reconstruction era were again recalled. Mr. T. F. Davidson remarked:

> I do not agree with that part of the report as to the rotation of judges. I think action along that line will be a mistake—a very serious mistake. We tried it once. I look around me and see only four members of the Bar here, who were here and will remember the time when we had that system, and I think they will agree with me that as long as they live, they will not want a return of that system.[41]

Mr. W. A. Guthrie of Durham expressed himself similarly.[42] The proponents of the resolution, among whom were numbered Locke Craige and Clement Manly, answered that the principle of rotation was to be preserved but that the system as it then prevailed demanded some amendment. Their views prevailed by a vote of forty-five to eight, but only after the somewhat superfluous condemnation of the rotation system was deleted.[43] Accordingly, a committee was instructed to prepare and submit a bill to the next meeting which would divide the State into three divisions.

The year 1911, then, marks the first victory of the opponents of the rotation system. It is true that their assault had not been a frontal one. Up until this time, they had not questioned the validity of rotation

[39] 13 REP. N. C. BAR ASSN. 22 (1911).
[40] *Id.* at 94. [41] *Id.* at 97. [42] *Id.* at 102. [43] *Id.* at 128.

as a general principle, but were convinced that the system had evils which made necessary a search for methods of improvement. The victory they won was undoubtedly the result of a general feeling that the administration of justice in the State had reached such a point that something had to be done. As Mr. H. S. Ward declared in 1912:

> A judicial system long satisfactory to the people and perhaps with them the favorite branch of their government is universally acknowledged to have worn out and become faulty for its dilatoriness, its tardiness and the "law's delay." Rights of persons and of property are allowed to suffer and are sacrified because there is not that speedy dispatch of business by the courts demanded by the spirit of the age.[44]

That "spirit of the age" referred to by Mr. Ward was the spirit of reform which was sweeping all America at the time. It was much in evidence at the meeting of the Association in 1912. The Committee on Legislation and Law Reform submitted a bill providing for the three divisions which was speedily approved.[45] The discussion was remarkable in that it produced the first plea for the localization of the judges. Mr. J. Will Pless of Marion declared:

> I do think it is important that we localize our judges. . . . The judge of my district holds my court sometimes, and sometimes he does not, and he holds your court sometimes. . . . We can have our courts held if we can localize our judges, and we will get the full two weeks.[46]

When the Bar Association Committee took their proposed bill to the 1913 meeting of the Legislature they soon found that others had been thinking of the necessity of reform. Very quickly after the opening of the session, some fifteen amendments to the Constitution were proposed. It was soon apparent that the clamor for reform was so great that it demanded special treatment. The result was that a Constitutional Commission was established to consider all the proposals and such others as might be suggested. The Commission was to submit its report to the Governor who promised a special session of the Legislature to consider any recommendations made. The members of the Commission were A. M. Scales, J. W. Bailey, N. J. Rouse, H. Q. Alexander, and D. Y. Cooper.[47] Their work was completed by mid-summer and a report submitted to the Governor.[48] The Commission proposed fourteen amendments. Those relating to the judiciary department were even more

[44] 14 REP. N. C. BAR ASSN. 10 (1912).
[45] *Id.* at 117.
[46] *Id.* at 76.
[47] There were also Legislative members of the Commission but they did not sign the Report presented to the Governor.
[48] The Report is printed in full in The News and Observer, July 20, 1913 (Raleigh, N. C.).

far-reaching than any measures that had been considered by the Bar Association. As to rotation, the Commission's amendment read as follows:

> The General Assembly do enact:
>
> That the Constitution of the State of North Carolina be and the same is hereby amended in manner and form as follows: . . .
>
> By striking out the words "four years" in section eleven of Article Four and inserting in lieu thereof the words "one year"; and by adding at the end of said section the following:
>
> The General Assembly shall group the Superior Court Districts into *not less* than five divisions, and may limit the respective circuits of judges of the Superior Court to the division in which their districts are, respectively, grouped.

It can be seen that the Commission proposed virtually to abandon the whole rotation system. In this connection, it is interesting to note Mr. Bailey's explanation of the Commission's procedure. He said that no amendment was agreed on finally until first submitted to the press and popular reaction gauged. He therefore claimed that the amendments which his Commission had presented had aroused only a favorable response. So far as the one involving rotation is concerned, the files of The News and Observer reveal no excitement on the part of the people.

In September of 1913 the Legislature met in special session to consider the work of the Commission. The proposed amendments were referred in each House to the Committee of the Whole. In the House of Representatives, the amendment quoted above was favored by a majority of 62 to 42.[49] Substantial as was this majority, however, the amendment was lost because it was one vote short of the necessary three-fifths for a favorable report. In the Senate, it met considerably stronger opposition. The vote there was 22 to 13 against it.[50]

In spite of the failure in the Legislature of the amendment restricting rotation, the opponents of the system did not abandon the fight. Indeed, they displayed more boldness than ever. At the next meeting of the Bar Association, Chief Justice Clark delivered the address, a part of which was quoted at the begining of this paper. Throwing caution to the winds, he subjected the rotation system to a scathing indictment. "The evils in its practical operation are known to all men," he declared. He assailed the notion that a constituency which had its own judge for only a fraction of his term should be called on to pass on his reelection.

> . . . If during . . . one-twentieth of his time he shall please the constituency of that one district, it matters not how much ineffi-

[49] The News and Observer, Oct. 3, 1913 (Raleigh, N. C.).
[50] *Ibid.*, Oct. 10, 1913.

> cient he may be the other nineteen-twentieths of his term. The election of judges under the rotating system can therefore serve no purpose and is utterly illogical.[51]

His attack continued:

> No other business in the world could submit to the economic waste of sending a man five hundred miles from his own district by whose people he has been selected, to a people who do not know him, and to secure whose approval he has no inducement except his sense of duty, at a great waste of time to the public, and at an enormous expense to the judge. . . . Besides, when a judge holds the courts of a district only once in ten years, what inducement is there to clean up the docket, when by yielding to the urgent request of counsel who desire delay the judge can go home before the end of the week, and the accumulation of business falls upon some succeeding judge. Our system tends directly to give every possible inducement to the judge to postpone the trial of cases and none to expedite them.[52]

The fight was also continued at the 1915 meeting of the General Assembly. Two positive results were achieved. The first, and more decisive, was that the act dividing the State into two divisions was passed.[53] Despite warnings that this signified the end of the rotation system, heavy majorities favored the measure in each House.[54] The second involved the creation of another commission.[55] Its assignment was not as broad as that of the earlier one. It was simply to study and report recommendations for reform in law and procedure.

The Commission, as appointed by Governor Craig, consisted of Walter Clark, W. J. Adams, W. A. Graham, W. P. Bynum, and L. V. Basset. Its report was released, apparently, some time in the summer of 1916. While differing on other issues, the Commission was unanimous in its condemnation of the rotation system. The report had this to say on the question:

> Rotation has been so long a part of our judicial organization that some are loath to consider its abolition, or to recognize its economical inefficiency. . . . It would be impossible to find a system that is more illogical. The rotating system now obtains in only two jurisdictions in the entire world, i.e., in North Carolina and South Carolina. It has persisted here in spite of its

[51] 16 REP. N. C. BAR ASSN. 49 (1914). Judge Clark was speaking, of course, before the State was divided into two divisions.
[52] *Id.* at 51.
[53] N. C. Laws, 1915; c. 15; N. C. GEN. STAT. §7-69 (1943).
[54] N. C. SENATE JOURNAL (1915), p. 154; N. C. HOUSE JOURNAL (1915), p. 99. The News and Observer, Feb. 3, 1915 (Raleigh, N. C.). The vote in the Senate was 34 to 6; in the House, there was a voice vote.
[55] N. C. Laws, 1915, Resolution 43.

illogical basis largely because it was supposed that it had been adopted in the beginning of our republican government.[56]

The specific recommendation of the Commission was as follows:

> An amendment to the Constitution empowering the Legislature, whenever the public opinion shall so require, to abolish the rotating system and require each judge to ride his own district, and that in the meantime the districts shall be so divided by legislation into circuits that each judge will ride his own district once in four years.[57]

Quite naturally, the report of the Commission excited considerable comment at the next meeting of the Bar Association. Indeed, it was considered at some length by Mr. Harry Skinner of Greenville in his presidential address. Mr. Skinner remarked:

> I hereby endorse practically the conclusions reached by what we call the Craig Commission . . . .
>
> It is the opinion of the Commission that a resident judge would accomplish at least one-fourth more work than under the general rotation system. It is thought that a judge who thoroughly understands the people and is thoroughly conversant with the litigation of his territory and the subject matter of the litigation is more capable of administering exact justice on both sides of the docket than an entire stranger, under the rotation system, carrying naturally with him a fever to return home as early as possible.
>
> I know it is held by some that a judge is more apt to administer impartial justice in a strange territory and among strange people and strange subjects of litigation, than where he is conversant with all these conditions.
>
> In my opinion this is not so of the judge who is competent and honest in all respects and worthy of wearing the Ermine; and if he is not of that type, his own people whom he is accustomed to serve will recall him at the first opportunity; whereas if he is the lawyer and the man he should be, they would make his tenure as long as he desired.[58]

A little later, when the Committee on Legislation and Law Reform made its report, the question became the business of the Association. The committee was composed of A. W. McLean, A. L. Brooks, J. W. Pless, and Fred J. Coxe. It, too, recommended that the proposal of the Craig Commission be approved.[59]

[56] REPORT OF THE COMMISSION ON LAW REFORM AND PROCEDURE (1916), pp. 6-7.
[57] *Id.* at 15.
[58] 18 REP. N. C. BAR ASSN. 39 (1916). As an example of how opinions changed on this subject, it is interesting to note that five years earlier Mr. Skinner had remarked: "I am just as much attached to the system of rotation as the others who have spoken, and not for one second would I have the Association consider any motion to change this system." 13 REP. N. C. BAR ASSN. 106 (1911).
[59] 18 REP. N. C. BAR ASSN. 75 (1916).

In the debate that followed, Mr. John D. Bellamy of Wilmington was the principal spokesman for the existing system. He spoke much of the wisdom of the forefathers. In addition, he advanced the following argument:

> I have lived a good many years in the practice of law, and I have lived to see some of the most ignorant judges I have ever seen on the bench, and to be afflicted with a man of that character for a term of eight years in a district composed of two or three counties would be an abomination that we could hardly tolerate.[60]

Whereupon this exchange took place:

> Mr. Isaac Wright, Wilmington: Don't you think if they didn't have the rotating system, and have to face the music all the time, they would not put up such a man?
>
> Mr. Bellamy: No sir; so long as the judiciary is elected by the people we are apt to have incompetent judges.
>
> Mr. Cooke: You think, then, it is fair to impose a judge upon some other district when he is not fit for yourself?
>
> Mr. Bellamy: I think the judicial system is a whole system, and ought to be able to transfer the judges from one county to another and have a better judge occasionally. When the judges are elected from the State at large it is one system, and we ought to have them travel from one district to the other, and let us have the wisdom of the better judges occasionally.[61]

Judge Pell of Raleigh supported Mr. Bellamy with enthusiastic praise of the rotation system.

> I believe [he said] rotation of judges in North Carolina is the strongest point in our system of courts, and I speak from short experience on the bench. I believe rotation of judges is powerful in the promotion of justice in this State. Soon after I was put on the bench the members of the bar of my county (Ashe), where I practiced six years, petitioned an exchange of courts with Brother Biggs, in order to get me out there and thrash the life out of me. I went up there, and about everybody there came before me during that term of court as defendant on the criminal docket and part of the civil proceedings was either an old friend or an old client of mine. I did my best to hold the scales of justice even-handed, but I tell you right now I doubt very seriously whether I did it or not. I do not believe it is possible for any person placed as I was to hold the scales even-handed. On one occasion when I was going from my hotel it took me a solid hour to make the trip, for friends would stop me to speak to me about something that was going on in the courts. How in the world can a judge under such circumstances do his duty? Then, again, there were motions to continue half the docket, not because

[60] *Id.* at 130.
[61] *Ibid.*

> I was suffering with shingles and drank liquor at all, but because George Pell was holding Ashe Superior Court, and every lawyer at the bar suspected that he was going to be inclined towards one or the other of his old friends or clients, and the result was we didn't do any business worth talking about. Now Gentlemen, I attended a great many courts in the West, and I pledge you my word it was a great comfort to me to go to a county like Gaston where I knew very few people, and walk in the court-house like a man feeling I was thoroughly equipped to do justice to all parties, because I was not friend nor foe of anybody there.[62]

Judge J. Crawford Biggs replied for the opponents of rotation. He began by asserting that the "present system was evolved out of the condition which we had in reconstruction, because we had in North Carolina at that time judges whom the people didn't believe were the proper men for the position." Continuing, he declared:

> Now I believe every lawer in this hall will agree with me in the statement that the Superior Courts are inefficient; we have not an efficient Superior Court bench. I do not mean to reflect upon the individuals holding the position, but our system is inefficient, and what is the cause? It is not due as a whole to incompetency of the judges. There are one or two instances of very old judges, who, by reason of ill health are not able to do the work, but in my judgment the inefficiency is due to the system of rotation. You cannot get a judge to do efficient work, properly fulfill his duties, if he is holding court two or three hundred miles from home and his wife or children are in the hospital at home needing his presence. I am utterly surprised at the statement of my friend Judge Pell when he says he doesn't think a judge can hold court in his home and do justice to litigants. I had experience of years upon the bench, and I held court in my old home Oxford, and held court in Durham, and Orange, and I never found any embarrassment in trial of either civil or criminal cases in those counties, and I don't believe it is the experience of the bench or bar that judges cannot do justice between litigants because they know the litigants.[63]

Perhaps the most significant statement made, however, was a much shorter one by Mr. L. R. Varser of Lumberton. Mr. Varser declared in effect that the Association was arguing a moot point. "The death knell to rotation was sounded," he said, "when we divided the State into two circuits."[64] This apparently was the view of most of those present. At any rate, the Association formally approved the Craig Commission's demand that rotation be abandoned.[65]

[62] *Id.* at 131-2. [63] *Id.* at 134-5. [64] *Id.* at 133.

[65] *Id.* at 136. The advocates of rotation were so much on the defensive that they tried to get a substitute adopted which would have provided for four divisions—a measure they had always previously stoutly opposed. The Association, however, was in no mood to compromise.

In retrospect, even though one knows that Mr. Varser was incorrect in his position, it is easy to see how he might have been misled. In three years time, the Bar Association had gone on record as being opposed to rotation and two special commissions had each unanimously recommended a change. Moreover, while the General Assembly had not yet been won over, there was much in its record to suggest that it would eventually do its part in producing a complete change. It had ordered the end of state-wide rotation. And a majority of its members who voted had been in favor of the extreme proposals of the Commission of 1913.

In view of these circumstances, it is no wonder that Mr. Varser thought that the doom of the system had been pronounced. What is surprising is that the Journals of the two Houses of the 1917 General Assembly are completely silent in regard to the subject of rotation. Nor does a search of the files of the News and Observer and of the papers of Governors Craig and Bickett shed any light on what became of the proposals of the Craig Commission. One can only surmise that the developing crisis in foreign affairs produced an atmosphere which discouraged change. It might be suggested, too, that the splitting of the State into two divisions and the amendment of the Constitution providing for special judges[66] revived, to some extent, the vigor of a system which appeared to be on its way out.

Despite any improvement wrought by these two measures, however, the question did not long remain dormant. In 1923 Mr. Varsar, who was then president of the Association, delivered a slashing attack on the rotation system in his presidential address. He explained that he had circulated a questionnaire as to what was wrong with the administration of justice in North Carolina. "The result of my inquiries," he said, "has brought to light the opinion of a majority of all those who responded to my inquiry, that the rotating system is the chief and irritating cause of the present unsatisfactory conditions of our dockets in the Superior Courts of this State." He continued by saying, "'What we need is a complete rewriting of this part of the Constitution at least so that the Legislature may provide a flexible and sensible resident system adequate and responsive to the State's needs."[67]

This recommendation, together with nine others made by Mr. Varser, were referred to a special committee. While advising delay on other matters, the committee insisted that immediately the "rotation of judges should be abolished and a resident system substituted."[68] This recommendation was accepted by the Association by a vote of 42-35.[69]

[66] N. C. Laws, 1915, c. 99; N. C. CONST., Art. IV, §11.
[67] 25 REP. N. C. BAR ASSN. 33 (1923).
[68] *Id.* at 151.
[69] *Id.* at 152.

This resolution, however, produced no legislative results. A proposal to do away with rotation was considered at the extra session of the General Assembly in 1924. But it was accompanied by a measure which seemed to guarantee Superior Courts only to those counties having more than 50,000 population. This drew as much fire as the rotation proposal and the result was an adverse vote in the House of 71-24.[70] Accordingly, in 1925, the president of the Association, this time Judge G. V. Cowper, returned to the attack.[71] Again attention was directed to the crowded dockets. In Judge Cowper's view, the explanation was that the judges bore no "personal responsibility. Any such personal responsibility," he concluded, "is an impossibility under the rotation system and with the limited power of the presiding judge today." Although a resolution was offered which sought to commit the Association once more to the abandonment of rotation,[72] it is not recorded that it was acted on at this session.

Judge Cowper continued his argument along the lines indicated at the 1927 meeting of the Association. He asked:

> If things have gone wrong in your district, upon whom can you place the finger of blame? No judge can really become intimately familiar with the conditions in from two to seven or eight counties constituting a district in the space of six months service. Even where one of these judges returns to his home district—under ordinary conditions it is after five years absence—and we all know the changes that may be wrought in that time. Undoubtedly this accounts for the illogical procedure of the assumption by the Legislature of the duty of fixing the court calendar for each district in the State.[73]

He suggested a further problem:

> Suppose the infant's land is authorized to be sold at about half its value, and is resold a day or two later at a double price. Who can be held responsible? Certainly not the Superior Court judge, who may be spending his first week in the particular county.[74]

Again he argued:

> It may happen that expenditures and fees are allowed from receivership estates which later when totaled appear exorbitant. How can it be avoided when we consider that perhaps ten or more different judges have been applied to for this allowance, each judge unconscious of the action of his predecessor, and too much pressed for time to review hundreds of papers of court

[70] The News and Observer, Aug. 20, 1924 (Raleigh, N. C.).
[71] 27 REP. N. C. BAR ASSN. 17 (1925).
[72] *Id.* at 38. The resolution was offered by D. H. Bland.
[73] 29 REP. N. C. BAR ASSN. 103 (1927).
[74] *Ibid.*

> papers and records. Surely the present system of Superior Courts does not lend itself to special sessions and these important at chambers matters.

Judge Cowper's conclusion was

> that the time has come when we must repeal that provision in the Constitution which requires our Superior Court judges to rotate. . . . We can no longer dispute the experience of practically the whole judicial world on this subject.[75]

The debate that ensued followed the usual lines. Finally, it was decided that a committee should be appointed, one part of it favoring rotation and the other opposed. The committee was instructed to report the arguments on both sides to the next meeting of the Association.

When the reports were presented the following year, they added little to what had already been said.[76] Those favoring rotation argued:

> The system has been arrived at through experiment and experience and is too large a part of the life of our people to be abandoned without some more weighty reason than has been heretofore advanced. We therefore unqualifiedly recommend that in the rearranging of our judicial system that the rotation of judges be retained.[77]

In the discussion, the advocates of rotation made no effort to answer the many criticisms that had been made of the system. Mr. Bellamy of Wilmington again told the Association of "Greasy Sam" Watts and recalled the Reconstruction era. He closed with this fervent plea:

> Having been through the bitter experience of the past, having suffered personally by it, I want to warn the young men of this Association from ever getting rid of the rotating system. It is your salvation, young men. Vote to sustain it, if you can.[78]

One speaker, Mr. McRae of Charlotte, in arguing for the present system recounted the experience in Mecklenburg County the previous year. He told of 2,500 cases on the docket and explained that the Bar petitioned the Governor to designate the resident judge to hold a special six-months term to do something about the situation. The result was that great progress was made. Such progress, Mr. McRae argued, was evidence of the adequacy of the rotation system when properly handled.[79] Mr. J. W. Pless made the obvious report. He remarked:

[75] *Id.* at 104.

[76] The reports appear at 30 REP. N. C. BAR ASSN. 146 (1928). Appended to the report of the opponents of rotation is a useful compendium of the various statutory and constitutional provisions of other states.

[77] 30 REP. N. C. BAR ASSN. 148 (1928).

[78] *Id.* at 169.

[79] *Id.* at 167.

> We are told by the distinguished member of the Mecklenburg Bar that they have had a wonderful six months in their district; that they have been able to reduce their calendar by 1,500 or 2,000 cases. How did you do that? According to the speaker, by getting his home judge to come there and hold the court and relieve the situation. Their home judge to do it! Did the people of Mecklenburg County object to trying the cases before the distinguished judge of their home county? No.[80]

Mr. Pless continued:

> We are not in the situation we were at the time my distinguished and venerable friend Mr. Bellamy refers to. Times have changed. Political conditions are not what they were then. They do not enter into every affair in human life as they once did. . . . Every time we undertake to do anything at the Bar Assocation and through the Legislature some one tells us about the horrors of reconstruction and we are held right down to where we are because of what we suffered in those days. . . . I do hope that the time will come when we can treat these matters as they relate to us at this time. We are a different people, we are subject to different influences, we are not confined and controlled and influenced by the enmities and rancors of the old days which still live so vividly in the breasts of some of our members.[81]

The advocates of rotation, thus subjected to heavy going in the debate, received substantial aid from an unexpected source. They produced a letter from Professor Leon Green of the Yale Law School which fulsomely lauded the rotation system. The writer declared, "If I were a citizen of your State, I should be protesting from sun-up to sun-down against any further change in your courts."[82] This was enough to carry the day. By the narrow margin of 42-39 the advocates of rotation prevailed.[83] Thus for the first time in nearly thirty years, the Association went on record opposing any change in the rotation system.

What has been said and done on the rotation question since 1928 need not be told in detail. Since that time, two commissions have studied the subject. The first of these commissions, that of 1932, proposed that rotation should be abandoned as a constitutional principle and the matter left to the discretion of the Legislature. This proposal, included in a draft constitution, survived passage through a special joint committee, through the Senate, where the vote was 39-1,[84] only to fall in the House of Representatives where it was deleted by a vote of which there is apparently no record.[85]

[80] *Id.* at 170. [81] *Id.* at 171. [82] *Id.* at 150. [83] *Id.* at 179.

[84] The News and Observer, March 16, 1933 (Raleigh, N. C.).

[85] The N. C. HOUSE JOURNAL is silent. The News and Observer of May 4, 1933 (Raleigh, N. C.), notes the amendment but does not report any vote or discussion.

The problem of efficiency in the courts, however, continued to trouble the Legislature. Accordingly, in 1937, the Legislature once more resorted to the technique of a special study. It established a body known as the Judicial Commission. In its report, the Commission faced both ways on the question of rotation. It said that the system should be retained "for the present." Its reasons were that a constitutional amendment would be necessary for a change and that our judges are elected by the people. But the Commission did record its conviction that many "matters requiring the attention of judges in chambers are not being handled with the care to which they are entitled."[86] Accordingly, it recommended that the State be divided into three divisions and that judges "assigned to counties for fixed terms should remain in the counties to which assigned during the fixed terms of court, except in cases of emergencies."[87] I have been able to discover no record of any consideration of this report by the Legislature.

After 1928, the question of rotation continued to be a topic of discussion at meetings of lawyers. For a time, the efforts of the lawyers were directed towards discovering some arrangement within the system which would make for a more effective administration of justice. Thus, in 1935, Mr. Francis E. Winslow argued to the Bar Association that judges should remain in a district for an entire year rather than for just six months as at present.[88] In 1936, Judge Pless offered the suggestion that an arrangement should be made whereby a judge could be in his home district every fifth week.[89] In 1941 Judge Marshall T. Spears of Durham presented "A Critical Discussion of the North Carolina Superior Court System" to the State Bar.[90] He, too, gave some attention to the problem of how best to make the rotation system effective. His principal emphasis, however, was on the abolition of the system. He observed:

> So far as I have been able to observe, there is no demand by the people at large for a continuance of the rotation system. It is principally a question for the judges themselves and the lawyers to decide and then submit the question of constitutional amendment to the voters.[91]

His arguments were much the same as those which had been urged previously, but they carried perhaps greater weight because of his recent

[86] REPORT OF THE JUDICIAL COMMISSION (1939), p. 7.
[87] *Id.* at 6.
[88] 37 REP. N. C. BAR ASSN. 146 (1935).
[89] 3 PROCEEDINGS N. C. STATE BAR 35 (1936). Mr. Dillard S. Gardner later presented in Popular Government, Vol. IV, No. 1, October 1936, p. 14 (Institute of Gov't), a scheme for putting this suggestion into practice.
[90] 8 PROCEEDINGS N. C. STATE BAR 20 (1941).
[91] *Id.* at 22.

experience as a Superior Court judge. "It certainly does not create efficiency," he declared,

> to say to a judge "You may hold the courts of a district only for six months in four years." Why it takes almost that long for a judge to get acquainted with the lawyers and the various court officials. Pray tell me what is to be gained by requiring a judge who resides in Alamance County to travel 290 miles to hold a term of court in Manteo or by requiring a judge who resides in Rockingham to ride 328 miles to hold court in Murphy. Rotation results in divided responsibility. No one judge can be held accountable for a congested docket in any district. Cases are often continued by one judge for what appear to be varied reasons. The same arguments are made to the next judge and again a continuance is granted. Receiverships seldom are closed within a period of six months with the result that different judges at various times make orders without any knowledge or information concerning previous orders made by some other judge. Special proceedings for the sale of real estate frequently remain open for several years pending the settlement of estates. During this time several judges are asked to approve and confirm sales. One judge appoints a Commissioner to sell land and another judge is asked to confirm the sale and make an allowance to the Commissioner for his services. Many other illustrations of the total absence of any continuity in such matters can be enumerated.[92]

III

In what follows, I shall try to summarize briefly the conclusions suggested to me by the material presented in the preceding pages. The diversity of opinion revealed stands as a warning, of course, of the danger of expressing one's own ideas too positively. And yet there are some observations which can be made with a degree of confidence. First of all, it seems clear that whatever its virtues, the rotation system has serious defects. In all the discussion which it has provoked, no one—so far as I know—has denied that it renders almost impossible the definite fixing of individual responsibility for the swift and efficient administration of justice; that it is often a stimulus to delay when a lawyer, for any reason however trivial, prefers to take his chances with a judge other than the one then in his district; that it often forces a judge to spend in travel much time which he could, with great profit to himself and the State, devote to other things; that, despite heroic efforts, it frequently results in a judge's being unavailable when he is needed. Nor has anyone dared to assert that the system, as it has operated and

[92] *Ibid.* The protest against rotation has continued. At the 1947 meeting of the State Bar, the Hon. John J. Parker attacked the institution, as did Mr. John C. Rodman in his presidential address to the 1948 meeting of the State Bar Association.

as it operates now, is at all adapted to the effective disposition of chambers matters.

This last point is worth pausing over a moment. It is a truism by now that the work a judge does out of court is of decisive importance. This must increasingly be the case if we are to exploit fully the spectacular values of the pre-trial conference. But if a judge must travel miles from his home to hold a term of court, to return he knows not when, how can he have any schedule for systematically attending to chambers matters? And how can he, if he is in court the entire time he is away, attend to such business for the lawyers in the district in which he is holding the courts? We must not allow the splendid results often achieved by judges laboring under such conditions to obscure either the obstacles which they must overcome or the occasions when such obstacles prove insuperable. Rather we should ask anew the popular question of a few years ago, "Is this trip really necessary?"

We have been told that it is, or, in any event, that it is desirable. However great the burdens of rotation, it is said that we must bear them for a variety of reasons. These can be briefly recapitulated: rotation is one of our oldest traditions; it gives us a state-wide judiciary; it has exerted a unifying influence on the people of the State; it broadens the outlook of the judge; it guarantees an independent and impartial judiciary.[93]

Are these reasons sufficient for retaining an institution so vulnerable? I should be more inclined to answer affirmatively if rotation were the only device capable of producing the benefits it is said to confer. It is true that we have had, under rotation, a learned, independent, and impartial judiciary. But this cannot mean that this is the only way to secure such a blessing. Judicial integrity is not limited to the Carolinas.[94] It may be that if rotation is abandoned, we shall have to alter considerably our present arrangements concerning judicial selection and tenure. If so, we must set ourselves to the task, not acquiesce in demonstrated inadequacy.

This inadequacy of existing arrangements is, I believe, the crucial point in this discussion. There is abundant evidence that our judicial system has not been as effective as the needs of the State require. Year

[93] Advocates of rotation have also argued that it is valuable because it makes the benefits of a particularly able judge available to the whole state and evenly distributes the ill effects of one who is not thoroughly capable. This argument would have some weight if judges were in fact centrally selected. Even if this were the case, however, the gain would be illusory. The ill effects of a poor judge are no less when borne by a great number of people. In fact, the results may be worse as the inadequacies will be dangerously obscured.

[94] The suggestion that only North and South Carolina have rotation is perhaps extreme. It is true that the constitution requires rotation only in these two states. However, it prevails to some extent in a few other jurisdictions by force of statute. See Bobbitt, *Rotation of Superior Court Judges,* 26 N. C. L. REV. 335 (1948).

after year the story is the same—crowded dockets, delays, expense. No one could argue that rotation is solely responsible for this unhappy condition. It is nevertheless true that it has been blamed more often than any other single factor, perhaps more often than all other factors combined. The essence of the matter is that rotation was designed to meet the problems of a day that is gone. A tacit assumption supporting it is that a judge's business is almost exclusively that of holding court. There is the further assumption that there will not be much of that. Clearly, those days are past. The problem now is to meet the demands of a state with an expanding agricultural and industrial economy. In searching for a solution, I agree that we may legitimately seek guidance in the past. I therefore suggest that we reflect once again on the action of the 1790 General Assembly. Its members adopted a rotation statute for a very simple reason. They wanted to fix responsibility for the efficient administration of justice. It would be ironic indeed if the tool which they fashioned to achieve this purpose were allowed to stand a century and a half later as a barrier to its accomplishment. If we would honor the fathers, we must make not their method but their purpose our own.